being unlawfully kept on said premises in violation of law." Municipal Court Judge Joyce did not issue a warrant on the affidavit of Officer Brace as presented. Officer Brace then said, and the Judge printed in ink immediately after the typewritten matter on the affidavit, "informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation." These two sentences were the entire recital as to probable cause. Appendix, page 27.

A search warrant issued and a search of the premises by the police disclosed a secret room in the cellar and produced numbers slips and stolen property.

A motion to suppress the evidence based on the affidavit for search warrant was filed in the Ohio Municipal Court. No hearing was had on the motion and no preliminary hearing was had. On September 11, 1962, three indictments were returned (petitioner was found not guilty on one). Motions to suppress with memorandum were filed under each indictment. The prosecutor did not answer these motions, and in hearings before the Common Pleas Court, lasting about three minutes, each motion was overruled. Under *State v. Lindway*, 131 O. S. 166, the Court was ordered not to concern itself with the collateral issue of how the evidence was obtained.

At the hearing on a petition for a writ of habeas corpus before the District Court on the sufficiency of the affidavit for the search warrant, the District Court granted the writ. The Circuit Court reversed.

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals for the Sixth Circuit has interpreted a provision of the Constitution of the United States directly contrary to the decisions of this Honorable Court.

The District Court in its findings when granting the writ, Appendix, page 12, said

> "Under the Fourth Amendment of the United States Constitution a search warrant may not be issued in the absence of a showing of probable cause, supported by oath or affirmation. It is now established that the Fourth Amendment proscriptions are to be enforced against the states through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U. S. 643 (1961); *Ker v. California*, 374 U. S. 23 (1962), and that the standard of probable cause for obtaining a search warrant under state law is to be measured by the same constitutional standard which governs the determination of probable cause under federal law."

The fact that the Municipal judge in this case made additions to the affidavit and warrant by printing in ink, "informant states that there is a secret room in the cellar. Admitted to officers that he is a part of Naples gambling operation," does not indicate an "independent determination that probable cause existed."

The words are merely conclusions of the affiant. The standards of this Court are applied in *Giordenello v. United States*, 357 U. S. 480, 486:

> "The Complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's re-

liance upon a presumption that the complaint was made on the personal knowledge of the complaining officer. The insubstantiality of such an argument is illustrated by the facts of this very case, for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. In these circumstances, it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged."

In *Nathanson v. United States,* 290 U. S. 41, 47:

"Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."

Aguilar v. United States, 378 U. S. 108, 113:

"The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession."

The District Court in granting the writ stated that

"*Aguilar* is a composite pronouncement of the rulings made in *Nathanson v. United States,* 290 U. S. 41 (1933), *Jones v. United States, supra, Giordenello v. United States,* 362 U. S. 257 (1958), *Mapp v. Ohio, supra,* and *Ker v. California, supra.*"

The bare statement of the affiant in the affidavit that petitioner (a month before the issuance of the warrant) admitted he and his brothers were gamblers is not personal knowledge that contraband was illegally kept in the residence.

This Court in the following cases defined "probable cause." *Rugendorf v. United States,* 376 U. S. 528; *Sanford v. Texas,* 379 U. S. 476; and *United States v. Venbresca,* 380 U. S. 102.

The Fourth and Fourteenth Amendments of the United States Constitution render inadmissible in a state court all evidence obtained as a result of an illegal search and seizure. The findings and order of the District Court should be upheld and the ruling of the Circuit Court reversed.

CONCLUSION.

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

DAN W. DUFFY,
JOHN J. KANE, JR.,
Attorneys for Petitioner.

APPENDIX.

OPINION AND ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

(Filed June 28, 1967.)

This is an application for a writ of habeas corpus. The petitioner seeks relief pursuant to Title 28, United States Code, Section 2241. After two separate jury trials in the Court of Common Pleas of Mahoning County, Ohio, Joseph Naples was convicted of promoting a scheme or game of chance, and receiving and concealing stolen property. The judgments of conviction were affirmed by the Court of Appeals for the Seventh Judicial District of Ohio, and subsequently by the Supreme Court of Ohio. *The State of Ohio v. Naples,* 175 O. S. 550 (1964).

In his appeals, petitioner raised the same question which he presents to this Court. The sole issue before this Court involves the admissibility, during the state court trials, of certain evidence allegedly obtained by an illegal and unlawful search and seizure.

The facts underlying the search and seizure are as follows:

On July 24, 1962, at approximately 11:00 o'clock A.M., Detectives Gerald Brace and Martin Krohn, of the Youngstown Police Department were called in to police headquarters by Lieutenant Michael Carney, who at that time was Acting Chief of the Detective Bureau of the Youngstown Police Department. Lieutenant Carney told Detectives Brace and Krohn that he wanted the detectives to get a search warrant for the Joey Naples residence because he had information from an informant that there was a secret room in the cellar of this residence.

After this conversation, Detective Brace proceeded to make out an affidavit for the purpose of obtaining a search warrant for the Naples' home. See Exhibit A. The statement that Detective Brace believes, and has good cause to believe, that certain property, to wit: explosives, gambling equipment, guns, narcotics, gambling records and monetary proceeds, stolen goods and any contraband were in a house occupied by Joseph Naples, was not inserted in this affidavit at the request of Lieutenant Carney, nor was it based on any information given to Detective Brace by Lieutenant Carney. Rather, Detective Brace's reasons for placing these items in the affidavit were two-fold. First, he knew that on a previous occasion other officers had searched the home of one of petitioner's brothers and found a number of guns, and further, that there had been a prior search of petitioner's house which turned up some guns. Secondly, on the occasion of the murder of the petitioner's brother, Billy Naples, on July 1, 1962, Detectives Brace and Krohn went to the Naples' home that night to question Joey Naples about the murder. A radio broadcast earlier on this date had circulated the rumor that Billy Naples had been a burglar. In the course of this interview and in response to this rumor, petitioner had stated to the detectives that Billy "was not a burglar; we are gamblers."

After filling out the affidavit, and before executing it, Detective Brace, accompanied by Detective Krohn, applied to The Honorable Martin P. Joyce, a judge of the Municipal Court of Youngstown, Ohio, for a search warrant. After examining Detective Brace's affidavit, Judge Joyce concluded that it was not sufficient to permit the issuance of a search warrant. Whereupon, Judge Joyce asked Detective Brace if he had any other information that might be included in the affidavit to support the issuance of a

search warrant. In response, Detective Brace told Judge Joyce that an informant had provided information that there was a secret room in the cellar of the Naples' home. Detective Brace did not identify the informant to the magistrate. He did not identify Lieutenant Carney as the person who received the information from an informant. Nor did the detective disclose to the magistrate where or how Lieutenant Carney's informant got his information. Detective Brace, however, told the magistrate about the statement allegedly made by Joey Naples on the night of July 1, 1962.

The additional information supplied by Detective Brace satisfied the issuing magistrate that probable cause existed. Judge Joyce then proceeded to print in ink the following information which was inserted at the end of the typewritten matter on the affidavit and search warrant:

> "Informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation."

Thereafter, Detective Brace signed the affidavit under oath and Judge Joyce issued the search warrant.

After obtaining the search warrant, Detective Brace, Detective Krohn, and Detective Donald Baker went to 605 Carlotta Drive, the home of the petitioner. The petitioner was not at home when the detectives called. Petitioner's wife, however, informed the detectives that her husband was working at the Center Sandwich Shop. At the direction of Detective Krohn, Mrs. Naples called her husband at this restaurant and asked him to come home. Petitioner then talked to Detective Krohn on the phone and asked the detectives to pick him up at the restaurant because he did not have transportation to get home.

Shortly after the telephone conversation the detectives met the petitioner at the Center Sandwich Shop and

presented the search warrant to him. On the trip to his residence petitioner told the detectives that his mother and father had a doctor's appointment at 1:00 o'clock P.M. and asked the detectives not to go into the house until after his parents had left because they were along in their years and this search might upset them. The detectives honored petitioner's request, and waited in the back yard of 605 Carlotta Drive until they saw petitioner's parents leave the premises. The detectives then entered petitioner's home and proceeded directly to the cellar. There the detectives began searching for a secret room.

There were two stairways leading into the cellar of the Naples' home. The detectives believed that a secret room would most likely be found under one of these stairways. Under the first stairway they examined, the detectives found a storage closet with shelves to hold canned foods. During the detectives' search of this closet, petitioner offered to remove these shelves. When the detectives were satisfied that the secret room was not located in this closet, they continued their search under the other staircase. The walls under the second staircase were panelled with knotty pine. As the detectives examined this wall, petitioner stated, "I'll give you an ax and tear down the walls if you want to." Detective Krohn continued the search by hitting the panelled wall, when all of a sudden a door popped open, exposing a room and its contents. The contents of this room included a quantity of guns of various kinds, gun silencers, ammunition, a bolex camera, a mink coat, lottery slips, and lottery records. Most of these items were introduced into evidence in the two Common Pleas Court trials.

The petitioner's principal contention is that the affidavit of Detective Brace is insufficient to form a basis for determining if probable cause exists for the issuance of

a search warrant. Respondent, on the other hand, asserts not only that the affidavit is sufficient, but that petitioner had consented to the search of his home.

Under the Fourth Amendment of the United States Constitution a search warrant may not be issued in the absence of a showing of probable cause, supported by oath or affirmation. It is now established that the Fourth Amendment proscriptions are to be enforced against the states through the Fourteenth Amendment, *Mapp v. Ohio,* 367 U. S. 643 (1961); *Ker v. California,* 374 U. S. 23 (1962), and that the standard of probable cause for obtaining a search warrant under state law is to be measured by the same constitutional standard which governs the determination of probable cause under federal law.

The affidavit in this case sets forth two specific grounds for Detective Brace's belief that probable cause existed, namely: (1) the police had information from an informant that there was a secret room in the cellar of the Naples' home; and (2) petitioner had told Detective Brace and Detective Krohn that he was involved with the family gambling operation.

It is clear that this affidavit is based in part on hearsay. Further, this affidavit contains no affirmative allegation that the affiant, or his unidentified source, had personal knowledge of the existence of a secret room in the cellar of petitioner's home.

The federal standard for obtaining a search warrant where hearsay forms the basis of the supporting affidavit was reviewed by the Supreme Court in *Aguilar v. Texas,* 378 U. S. 109 (1964). The Court there declared:

> Although an affidavit may be based on hearsay information and need not reflect a direct personal observation of the affiant, *Jones v. United States,* 362 U. S. 257, the magistrate must be informed of some

> of the underlying circumstances from which the informant concluded that the narcotics were where they claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U. S. 528, was "credible" or his information "reliable." *Aguilar v. Texas, supra,* at 114.

The holding in *Aguilar* makes it clear that where the basis of an affidavit is an informant's conclusion, the issuing magistrate must be informed of (1) some of the underlying circumstances upon which the informant based his conclusion—(as in this case that there was a secret room in the cellar of the Naples' home), and (2) some of the underlying circumstances upon which the affiant believed that the informant was credible or his information was reliable.

This Court is of the opinion that the first requirement of *Aguilar* has not been met. The informant's statement, contained in the affidavit, that there was a secret room in Naples' cellar was nothing more than a bare conclusion. There is nothing in this affidavit to inform Judge Joyce of the underlying circumstances upon which the informant arrived at his conclusion. As a matter of fact, the record supports the inference that neither Lieutenant Carney nor Detective Brace was in possession of the informant's source of information.

The kind of hearsay appearing in this affidavit is never acceptable to support the finding of probable cause. The danger of using such information is obvious. The informant may have picked up this information from another person who in turn heard it from someone else. Such a statement may be based on mere suspicion, or it might be just a lie created by a vindictive individual in an

attempt to slander or embarrass the person against whom the information is aimed.

The Supreme Court's statement in regard to the insufficiency of the affidavit involved in *Aguilar* applies equally well here:

> The vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello*. Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in the petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on * * * to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion." *Aguilar v. Texas, supra,* at 113-14.

Having determined that the affidavit in the present case is insufficient because the magistrate was not informed of the underlying circumstances upon which the informant concluded that a secret room was in the petitioner's home, the Court finds it unnecessary to reach the question of whether or not the second requirement of *Aguilar* was met.

Although the retroactivity of *Aguilar* was not raised by the respondent in briefs or argument, the Court deems it necessary to meet this question in this decision.

Implicit in the resolution of the issue of the insufficiency of the affidavit of Detective Brace to support the

finding of probable cause is the Court's determination that *Aguilar v. Texas, supra,* is retroactively applicable to this state court case in which direct review was exhausted prior to the date of decision in *Aguilar,* but subsequent to the date of decision in *Mapp v. Ohio, supra,* and *Ker v. California, supra.* The Court believes and therefore holds that such retroactive application is justified in the instant case because *Aguilar* is a composite pronouncement of the rulings made in *Nathanson v. United States,* 290 U. S. 41 (1933), *Jones v. United States, supra, Giordenello v. United States,* 362 U. S. 257 (1958), *Mapp v. Ohio, supra,* and *Ker v. California, supra.*

Adherence to the strict language in *Aguilar* through a retroactive application, while greatly helpful, is not entirely necessary to support the resolution of the issue of the sufficiency of the affidavit as presented in this case. An adequate basis for finding that the affidavit as finally executed by Detective Brace was insufficient to support the magistrate's finding of probable cause exists in the federal standard for reasonable searches as announced in *Nathanson, Jones,* and *Giordenello* and as imposed upon state authorities in *Mapp* and *Ker.*

Attention is now focused on the question of whether petitioner in some way consented to the search.

While it is true that consent can validate an otherwise unlawful search, the circumstances which can give rise to such consent have never been satisfactorily determined. However, certain principles are clear. Consent to a search is never presumed, and the burden is upon the government to show that there was no duress or coercion, express or implied, and that the consent was unequivocal, specific and freely and intelligently given. *Villano v. United States,* 310 F. 2d 680 (10th Cir. 1962); *Simmons v. Bomar,* 230 F. Supp. 226 (M.D. Tenn. 1964). Moreover, mere consent in

the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. *Johnson v. United States,* 333 U. S. 10 (1937); *Simmons v. Bomar, supra.* It is the respondent's position that petitioner's request to defer the search until his parents left the house and petitioner's later statements in which he offered to assist the detectives in removing the shelves and also offered to get an ax and help the detectives tear down the walls amounted to consent on the part of petitioner. This position is untenable.

Nowhere in the record does it appear that petitioner rejected this search warrant presented to him. On the contrary, all of petitioner's actions were consistent with the belief that the warrant was perfectly legal. Moreover, it is difficult to see where there has been any consent. Having served the search warrant, it can properly be assumed that the detectives were going to go ahead with the search regardless of what petitioner said or did. Clearly, petitioner was not in any bargaining position at this time. Hence, it cannot be said that the petitioner's request amounted to a deal whereby he would consent to the search if the officers waited until his parents left the premises.

In regard to the statements made to the detectives during the search of the cellar, it is only normal for an individual to protest his innocence once he is brought under investigation for a crime. The statements made by petitioner offering assistance to the detectives were merely consistent with his position of innocence.

Where a search, as in this case, has been instituted under the authority of a search warrant, the question of consent cannot arise in the absence of a plain and clear showing that the individual being subjected to the search has refused to recognize that the search warrant is valid

and binding. Stated otherwise, unless an accused, after being served with a search warrant, unequivocally states that he believes that the search warrant is unlawful and illegal, he cannot consent to the subsequent search.

All of the statements made by the petitioner occurred after he had been served with the search warrant. There can be no clearer example of a demand made under the color of law or office. Any consent given in such an instance must be almost conclusively presumed to be granted in submission to authority rather than as an understanding and intelligent waiver of a constitutional right.

WHEREUPON, the Court determines that this petitioner's application for a writ of habeas corpus is meritorious, and therefore the writ should issue.

Accordingly, it is ORDERED that the petitioner is hereby remanded to the Common Pleas Court of Mahoning County, Ohio, for such further proceedings as may be deemed necessary and proper in accordance with law.

It is further ORDERED that upon the filing of a bond in the sum of Five Thousand Dollars ($5,000.00) with the Clerk of this Court, the petitioner shall be released from custody. Such bond shall be conditioned upon petitioner's appearance before the Common Pleas Court of Mahoning County, Ohio.

It is further ORDERED that if no further action be taken by the State of Ohio or the County of Mahoning within sixty (60) days after the filing of this Order, petitioner's release shall be final and unconditional and the bond cancelled.

/s/ JOSEPH P. KINNEARY,
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided April 19, 1968.)

Before O'SULLIVAN, PHILLIPS and COMBS, Circuit Judges.

PHILLIPS, Circuit Judge. This appeal presents the single question of whether an Ohio search warrant was issued without probable cause in violation of Fourth Amendment standards. The District Court granted a writ of habeas corpus, holding that the affidavit was insufficient under *Aguilar v. Texas*, 378 U. S. 108 (1964), and that this decision of the Supreme Court should be given retroactive effect. The warden of the Ohio Penitentiary appeals.

This is the second appeal from the action of the District Court in granting a writ of habeas corpus to Naples. On the prior appeal this Court reversed on grounds that did not involve the sufficiency of the affidavit to the search warrant. *Naples v. Maxwell*, 368 F. 2d 219 (6th Cir.), cert. denied, 386 U. S. 971.

Naples was arrested on July 24, 1962, as a result of a search conducted by police officers in Youngstown, Ohio, pursuant to a search warrant issued on that date. Evidence seized by the officers under the search warrant consisted of lottery slips, lottery records, various guns, including automatic weapons, gun silencers and ammunition, a Bolex camera and a mink coat. Naples was convicted and sentenced under an indictment returned by the Grand Jury of Mahoning County, Ohio. The two counts of the indictment involved on this appeal are for unlawfully promoting a numbers game or scheme of chance, for which he was sentenced to a term of from one to ten years, and for receiving and concealing stolen property, for which

he was sentenced to a term of from one to seven years, the sentences to run concurrently.

An appeal was perfected to the Ohio Seventh District Court of Appeals, where the judgment of the trial court was affirmed. On appeal to the Supreme Court of Ohio Naples raised the same question presented on the present appeal, i.e., whether the search was illegal because the search warrant was not based on legally sufficient probable cause. The Supreme Court of Ohio dismissed the appeal, *State of Ohio v. Naples*, 175 O. S. 550, 196 N. E. 2d 591 (1964), and thereafter denied an application for writ of habeas corpus which raised the same issue. *Naples v. Maxwell*, 176 O. S. 443, 200 N. E. 2d 340 (1964).

The affidavit to the search warrant is as follows, with two sentences italicized for emphasis:

AFFIDAVIT FOR SEARCH WARRANT

STATE OF OHIO
COUNTY OF MAHONING
CITY OF YOUNGSTOWN, SS:

IN THE MUNICIPAL COURT OF YOUNGSTOWN

Before me, JUDGE MARTIN P. JOYCE, a Judge of the Municipal Court, personally appeared one GERALD BRACE who being first duly sworn according to law deposes and says:

That he believes and has good cause to believe that on or about the 24th day of July, 1962, in the City of Youngstown, Mahoning County, State of Ohio, Certain property to-wit: Explosives, gambling equipment, guns, narcotics, gambling records & monetary proceeds, stolen goods and any contraband.

In a house, building or place, described as follows, to-wit:

A certain one story brick building, located at and referred to for street purposes as 605 Carlotta dr. is occupied by Joseph Naples.

The affiant says he has good reasons to believe and does believe that the aforesaid property or some part thereof is still kept or concealed at the place aforesaid, and that there is urgent necessity for the search thereof to be made in the (nighttime) or (daytime). This affidavit is based on facts as follows: that affiant has received information which he believes to be reliable and true, that the above named items, or a part thereof, are being unlawfully kept on said premises in violation of law. *Informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation.* (Emphasis supplied.)

/s/ GERALD BRACE

Sworn to before me by Gerald Brace, affiant, and subscribed in my presence this 24th day of July, 1962.

/s/ MARTIN P. JOYCE
Judge of the Municipal Court

Joseph Naples
24th July 62

The facts underlying the issuance and execution of the search warrant are these: On July 24, 1962, at approximately 11:00 a.m., Detectives Gerald Brace and Martin Krohn of the Youngstown Police Department were called to police headquarters by Lieutenant Michael Carney, who at that time was Acting Chief of the Detective Bureau. Lieutenant Carney directed the two detectives to get a search warrant for the Joseph Naples house and stated that he had been told by an informant that there was a secret room in the cellar of this residence.

Detective Brace thereupon proceeded to type an affidavit for the purpose of obtaining a search warrant for the Naples premises. The statement that Brace believed, and had cause to believe, that gambling equipment, guns,

narcotics, explosives, gambling records and monetary proceeds, stolen goods and contraband were in the Naples residence was based upon his knowledge of previous searches[1] of the houses of Naples and one of his brothers, and upon Naples' personal admission to Brace that he and his brother were gamblers.

As originally typed by Detective Brace the affidavit did not contain the two sentences italicized above. After filling out the affidavit, and before swearing to it, Detective Brace, accompanied by Detective Krohn, applied to the Honorable Martin P. Joyce, a judge of the Municipal Court of Youngstown, for a search warrant. After examining the affidavit, Judge Joyce concluded that it was not sufficient to justify the issuance of a search warrant. Judge Joyce thereupon asked the two detectives if they had any other information to support the issuance of a warrant. Detective Brace then told the Municipal Judge that an informant had disclosed that there was a secret room in the cellar of the Naples home. He also stated that he previously had a conversation with Joseph Naples in which Naples admitted that he and his brother were gamblers.

This additional information satisfied the Municipal Judge that probable cause existed. The Judge proceeded to print on the affidavit in ink the two sentences which are italicized in the above quotation. The same language was printed in ink on the search warrant. Detective Brace thereupon signed and swore to the affidavit and the Municipal Judge signed the warrant.

The details of the search are set forth as follows in the opinion and order of the District Court:

> "After obtaining the search warrant, Detective Brace, Detective Krohn, and Detective Donald Baker

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[1] No question of the legality of the prior searches is made on this appeal.

went to 605 Carlotta Drive, the home of the petitioner. The petitioner was not at home when the detectives called. Petitioner's wife, however, informed the detectives that her husband was working at the Center Sandwich Shop. At the direction of Detective Krohn, Mrs. Naples called her husband at this restaurant and asked him to come home. Petitioner then talked to Detective Krohn on the phone and asked the detectives to pick him up at the restaurant because he did not have transportation to get home.

"Shortly after the telephone conversation the detectives met the petitioner at the Center Sandwich Shop and presented the search warrant to him. On the trip to his residence petitioner told the detectives that his mother and father had a doctor's appointment at 1:00 o'clock P.M. and asked the detectives not to go into the house until after his parents had left because they were along in their years and this search might upset them. The detectives honored petitioner's request, and waited in the back yard of 605 Carlotta Drive until they saw petitioner's parents leave the premises. The detectives then entered petitioner's home and proceeded directly to the cellar. There the detectives began searching for a secret room.

"There were two stairways leading into the cellar of the Naples' home. The detectives believed that a secret room would most likely be found under one of these stairways. Under the first stairway they examined, the detectives found a storage closet with shelves to hold canned foods. During the detectives' search of this closet, petitioner offered to remove these shelves. When the detectives were satisfied that the secret room was not located in this closet, they continued their search under the other staircase. The walls under the second staircase were panelled with knotty pine. As the detectives examined this wall, petitioner stated, 'I'll give you an ax and tear down the walls if you want to.' Detective Krohn continued the search

by hitting the panelled wall, when all of a sudden a door popped open, exposing a room and its contents. The contents of this room included a quantity of guns of various kinds, gun silencers, ammunition, a bolex camera, a mink coat, lottery slips, and lottery records. Most of these items were introduced into evidence in the two Common Pleas Court trials."

We hold that the District Court was in error in ruling the affidavit to the search warrant to be insufficient under *Aguilar v. Texas, supra.* In that case the Supreme Court said:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U. S. 528, was 'credible' or his information 'reliable.' " 378 U. S. at 114.

There can be no doubt that, before issuing the search warrant, Municipal Judge Joyce made an independent determination that probable cause existed. After conducting personal inquiry and satisfying himself of the persuasiveness of the facts relied upon, including the fact that Naples had admitted to Officer Brace that he and his brother were gamblers, Judge Joyce inserted the two sentences above quoted. With these sentences added, it is our opinion that the affidavit meets the test of *Aguilar.*

The issuance and execution of this search warrant and the trial conviction of Naples took place prior to decision of the Supreme Court in *Aguilar,* which was announced on June 15, 1964. The District Court ruled that the decision

in *Aguilar* is retroactive in its application. Since we find the affidavit to be sufficient, it is not necessary to pass upon the question of whether *Aguilar* is retroactive or only prospective in its effect.

Reversed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed April 19, 1968.)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Respondent-Appellant recover from Petitioner-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING.

(Entered May 16, 1968.)

Before O'SULLIVAN, PHILLIPS and COMBS, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

STATUTES.

Ohio Revised Code, Section 2915.13—Promoting a "Numbers Game":

"No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

"Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years."

Ohio Revised Code, Section 2907.30—Receiving Stolen Property:

"No person shall buy, receive, or conceal anything of value which has been stolen, taken by robbers, embezzled, or obtained by false pretense, knowing it to have been stolen, taken by robbers, embezzled, or obtained by false pretense.

"Whoever violates this section shall be imprisoned not less than one nor more than seven years if the value of such thing is sixty dollars or more. If the value thereof is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both."

Title 28, United States Code, Section 2254—State Custody; Remedies in State Courts:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

AFFIDAVIT FOR SEARCH WARRANT.

IN THE MUNICIPAL COURT OF YOUNGSTOWN

STATE OF OHIO
COUNTY OF MAHONING
CITY OF YOUNGSTOWN, SS.:

Before me, JUDGE MARTIN P. JOYCE, a Judge of the Municipal Court, personally appeared one GERALD BRACE who being first duly sworn according to law deposes and says:

That he believes and has good cause to believe that on or about the 24th day of July, 1962, in the City of Youngstown, Mahoning County, State of Ohio, Certain property to-wit: Explosives, gambling equipment, guns, narcotics, gambling records, & monetary proceeds, stolen goods and any contraband.

In a house, building or place, described as follows, to-wit:

A certain one story brick building, located at and referred to for street purposes as 605 Carlotta dr. is occupied by Joseph Naples.

The affiant says he has good reasons to believe and does believe that the aforesaid property or some part thereof is still kept or concealed at the place aforesaid, and that there is urgent necessity for the search thereof to be made in the (nighttime) or (daytime). This affidavit is based on facts as follows: that affiant has received information which he believes to be reliable and true, that the above named items, or a part thereof, are being unlawfully kept on said premises in violation of law. Informant states that there is a secret room in cellar. Admitted to officers that he is a part of the Naples gambling operation.

/S/ GERALD BRACE

Sworn to before me by Gerald Brace, affiant, and subscribed in my presence this 24th day of July, 1962.

/s/ MARTIN P. JOYCE
Judge of the Municipal Court

Joseph Naples
24th July 62